the hold that he had. She was afraid of doing anything which might prejudice her position and her employment. It is not very difficult to see why she did not resist perhaps as strenuously as has been suggested she should have done. But it is perfectly apparent from her own story that she did put up as much resistance as she could.

Finally, it has been suggested that there was a lack here of mens rea, and we have been referred to the House of Lords decision in *DPP* v *Morgan*.[3] Assuming without deciding that the principle of *Morgan*[3] applies in Brunei, it is apparent to us that this case is of no assistance to this applicant. The point was not in fact taken or even canvassed in the court below for obvious reasons. On the facts here it was quite impossible to draw any distinction between the fact of consent and reasonable belief in consent. Either this girl had consented since July to a sexual relationship or she had not. There was no half-way house. There was indeed no assertion by the applicant in the witness box of a reasonable belief. The matter was not even canvassed. The judge's rejection of continuing consent going back to July makes this a point of no assistance to the application in this court.

For these reasons we can see no fault in the judge's approach or in his reasons. The application fails and must be rejected.

Application dismissed.

Solicitors: *Yu & Chiew.*

Reported by *Ng Sheau Jiuan*

MALAYSIAN REPORTS

Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn Bhd & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22-219-87
PEH SWEE CHIN J
5 OCTOBER 1989

Civil Procedure — Interlocutory injunction — Shares in company — Voting rights — Dispute between members — Threatened removal of managing director — Whether serious question to be tried — Equitable estoppel

Companies and Corporations — Shares in private company — Deceased member — Transmission of shares to personal representatives — Whether consent of directors necessary — No joint application by personal representatives for transmission — No grant of probate extracted — Whether registration of transmission invalid — Joint holders of shares — Voting rights — By whom exercisable — Beneficial owner of shares — Duty of registered owner to beneficial owner — Companies Act 1965, s 103

Trusts and Trustees — Will — Executors and trustees required to act jointly — Transmission of shares — No joint application by executors and trustees for transmission — No grant of probate extracted — Whether registration of transmission invalid — Duty of trustee to beneficiary — Equitable estoppel

The first defendant was a company in which 199,998 shares in its capital were registered in the name of the estate of one Ngan Yin, deceased. By his will, the deceased had appointed the second defendant and one of his daughters as the executors of the will. The executors had themselves registered as joint holders of the said shares in the share register of the first defendant in their capacity as personal representatives of the deceased, with the name of the second defendant appearing first in the register, with the result that the voting rights carried by the said shares were exercisable only by the second defendant as provided to that effect in the articles of association of the first defendant. The registration of the said shares in the names of the executors was effected at a time when the grant of the probate of the will had not been extracted yet. It was common ground that a total of 49,999 shares constituting a quarter of the said shares were beneficially owned by the first plaintiff.

The plaintiffs who were owners of the shares in the first defendant commenced an action against the defendants seeking: (a) an injunction restraining the second defendant from exercising the voting rights relating to the said shares; (b) an injunction restraining the second defendant from removing the first plaintiff as managing director of the first defendant; and (c) an order that the first defendant do forthwith rectify the register of members in respect of the said shares. The plaintiffs later applied for an interlocutory injunction praying for the same relief.

It was argued for the first plaintiff that the registration of the names of the second defendant and his co-executrix as holders of the said shares in their capacity as personal representatives of the deceased was void because the will provided that they were to act jointly and that the consent of the co-executrix to the registration had not been obtained. Another ground raised was that the grant of probate had not been extracted at the time of the registration. The third ground was that the consent of the board of directors of the first defendant to the registration had not been obtained and hence the registration was effected contrary to s 103(2) and (3) of the Companies Act 1965 ('the Act').

Held, allowing the plaintiffs' claim in part:

(1) The will of the deceased stated expressly that the executors and trustees were to act jointly, leaving no room for ambiguity so that strictly speaking, the second defendant and his co-executrix, in obeying the testator's intention, should have applied jointly for registration of themselves as the holders of the said shares as personal representatives of the estate of the deceased instead of the second defendant applying by himself and impliedly on behalf of the co-executrix in the matter of the registration of the transmission of the said shares. The express words of the will in question prevailed over the authority of one personal representative to dispose of pure personality without the concurrence of the other.

(2) No fraud of any kind was perpetrated in the registration of the transmission. The registration to and for the benefit of the estate would normally be one of the early steps in the administration of the estate and the said shares had been duly registered. The objection to the registration would therefore appear to be highly legalistic, trifling and inconsequential as far as the interests of the estate of the deceased were concerned.

(3) The fact that the grant of probate had not been extracted meant that, at the time of registration, there was no document which was by law sufficient evidence of probate of the will to effect transmission of the shares. However, the circumstances were inconsequential, thus attracting the de minimis rule, and furthermore the provisions s 103(3) of the Act constituted a directory requirement.

(4) The transmission of the said shares was by operation of law and was not a transfer at all and hence the consent of the board of directors to the registration of the transmission was not necessary.

(5) The question of the invalidity of the registration of the said shares was not a serious question for trial.

(6) The exercise of the voting rights relating to the said shares as threatened or proposed by the second defendant did raise a serious question for trial. Damages would not be an adequate remedy and the balance of convenience would lie in favour of the first plaintiff. An injunction would be granted on terms that the voting rights relating to the said shares may be exercised if and only if both executors of the estate of the deceased concurred separately and that, in the event of both executors so concurring, then such executor or either of them be estopped from exercising such rights as are based on one-quarter of the said shares. It would be quite outrageous and unconscionable or inequitable for the voting rights of the one-quarter of the shares (which the first plaintiff was beneficially entitled to under the terms of the will) to be exercised against the beneficial owner himself.

[*Editorial Note*: The second defendant has appealed to the Supreme Court vide Civil Appeal No 02-344 of 1989.]

Cases referred to

1 *Pow Hing & Anor* v *Registrar of Titles, Malacca* [1981] 1 MLJ 155 (folld)
2 *Howard* v *Bodington* (1877) 2 PD 203 (folld)
3 *London and Clydeside Estates Ltd* v *Aberdeen District Council* [1980] 1 WLR 182 (folld)
4 *Ting Chong Maa* v *Chor Sek Choon* [1989] 1 MLJ 477 (folld)
5 *Woodhouse AC Israel Cocoa Ltd* v *Nigerian Produce Marketing Co Ltd* [1972] AC 741 (refd)
6 *Siew Soon Wah* v *Yong Tong Hong* [1973] 1 MLJ 133 (refd)
7 *Ramsden* v *Dyson* (1866) LR 1 HL 129 (distd)
8 *Plimmer* v *Mayor, Councillors and Citizens of Wellington* (1884) 9 App Cas 699 (refd)
9 *Inwards* v *Baker* [1965] 2 QB 29 (refd)
10 *ER Ives Investment Ltd* v *High* [1967] 2 QB 379 (refd)
11 *Amalgamated Investment & Property Co Ltd* v *Texas Commercial International Bank* [1982] 1 QB 84 (refd)
12 *Willmott* v *Barber* (1880) 15 Ch D 96 (distd)
13 *Crabb* v *Arun District Council* [1976] 1 Ch 179 (folld)
14 *Taylors Fashion Ltd* v *Liverpool Victoria Trustees* [1982] QB 133 (refd)
15 *Shaw* v *Applegate* [1977] 1 WLR 970 (refd)

Legislation referred to

Companies Act 1965 s 103
Evidence Act 1950 s 115

Ng Seng Lee for the plaintiffs.
VS Viswanathan for the defendants.

Cur Adv Vult

Peh Swee Chin J: The matter before me was an episode of some bitter in-fighting among members of a family well known for producing a well-known brand of groundnuts in Perak. Since such in-fighting arose after the patriarch of the family had passed away, and because of similar past incidents elsewhere, many presumably would claim to have predicted it.

When the head of the family, viz Ngan Yin, died, he left behind, among others, four sons, a flourishing family company, viz the first defendant in this case (hereafter the 'family company') and his last will and testament. At this juncture, it would be pertinent to mention a bit about the will.

Under the terms of the will, a short and simple one, powers were given to the executors to pay debts etc, to call in assets etc and convert the same etc with absolute power to postpone such calling and conversion and to stand possessed of the residuary estate to be distributed equally among the said four sons. The deceased further directed that the distribution of his (residuary) estate was to take place six months after the date of his death.

The executors appointed were Ngan Tack Kong, the second defendant, (hereafter called 'the defendant brother') and a daughter of the deceased (hereafter called the co-executrix').

The dispute here was confined to the family company with an issued and paid-up capital of $1m of which each of the four sons of the deceased had held 200,000 shares each, with the rest held by the estate of the deceased (with 199,998 shares) and two other persons (with 1 share each). At the heart of the matter was the shares held by the estate of the deceased, viz 199,998 shares which formed part of the residuary estate, which, when split into four equal portions for the said four sons, would mean approximately 49,999 shares for each son. Both parties had argued on the basis, which I thought was reasonable, that each of the

four sons would inherit intact 49,999 shares in due course as a matter of time.

The executors had their names, as personal representatives of the deceased, registered as joints holders of the said 199,998 shares in the family company's share register with the name of defendant brother registered first and the name of the co-executrix immediately next. It is to be borne in mind that this had the effect that the voting rights carried by these 199,998 shares would only be exercised by the defendant brother and not the co-executrix, by virtue of a usual provision, and here it was art 59 of the articles of association of the family company in the following words:

> In the case of *joint holders* the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority *shall be determined by the order in which the names stand in the register of members.* [Emphasis provided.]

The said 199,998 shares were registered at a time when the grant of the probate of the will of the deceased had not been extracted. The fact proved to be highly controversial between the parties hereto in its consequences.

An elder son, one Ngan Tuck Meng, the first plaintiff, (hereafter called 'the plaintiff brother') had been running the family company for many years prior to the death of the deceased, and for a few years after the death.

The plaintiff brother, holder of 200,000 shares in his own right, a sister, holder of one share (and another who had since discontinued her action against the defendants) filed the present action against the family company as first defendant and the defendant brother as second defendant claiming to the effect an injunction restraining the defendant brother from (a) exercising the voting rights relating to the deceased's 199,998 shares, and (b) from removing the plaintiff brother as managing director of the family company. Thirdly, the plaintiffs claimed an order that the family company do forthwith rectify the register of members in respect of the 199,998 shares of the deceased.

The plaintiff then filed an interlocutory application praying for the same reliefs and thus it came before me, in its ex parte form, when the court was informed that the plaintiff brother had just received a notice of an annual general meeting of the family company. The court ordered that the annual general meeting be adjourned until the disposal of this interlocutory application which was ordered to be heard inter partes.

The matter then came up before me this time in the presence of both learned counsel. It would be pertinent to mention that it appears to be common ground or implicit that the defendant brother, as a joint-holder of shares for the estate of the said deceased would undoubtedly at the general meeting of the family company exercise voting rights relating to the 199,998 shares of the deceased against the plaintiff brother, his name having appeared first in the register of members before that of the co-executrix, and that the exercise of the voting rights of these 199,998 shares at such meeting would mean a conclusive victory for the defendant brother against the plaintiff brother in any matter, especially the disputed or intended removal of the plaintiff brother as the managing director of the family company. It would be also necessary to point out, in lieu of stating further details, that the plaintiff brother and the defendant brother had probably secured the support of other shareholders in such a way, that with their own respective shareholdings they both had about equal 'voting strength' without the intervention of these 199,998 shares of the deceased. It would be also necessary to mention that the co-executrix was aligned with the plaintiff brother against her co-executor, ie the defendant brother, but she could not for the plaintiff brother, help matters greatly on account of the exclusion of her voting rights by art 59 of the articles of association of the family company stated above.

It was argued for the plaintiff brother that the registration of the names of the defendant brother and the co-executrix as personal representatives of the deceased in regard to the said 199,998 shares was void because first, the consent of the co-executrix was not first obtained, because both executors had to act jointly by virtue of cl 1 of the will which provided: 'I appoint ... to be the executors and trustees of this my will '*to act jointly*' (emphasis provided). Secondly, the grant of probate had not been extracted at the time of the registration of the shares; and thirdly, no consent was obtained from the board of directors of the family company contrary to s 103(2) and (3) of the Companies Act 1965 (hereafter 'the Act'). For this third point, learned counsel also relied on arts 28 and 31 of the articles of association of the family company.

For convenience, I set out s 103 of the Act in its entirety:

> (1) Notwithstanding anything in its article a company shall not register a transfer of shares or debentures unless a proper instrument of transfer has been delivered to the company, but this subsection shall not prejudice any power to register as a shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.
>
> (2) A transfer of the share debenture or other interest of a deceased person made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer.
>
> (3) The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, of a deceased person having been granted to some person shall be accepted by the company, notwithstanding anything in its articles, as sufficient evidence of the grant.

(4) In this section 'instrument of transfer' includes a written application for transmission of a share debenture or other interest to a personal representative.

It was next submitted for the plaintiff brother that he had not been guilty of any breach of s 131 of the Act, the section requiring a director to disclose his interests in contracts, etc with the company to its board of directors.

It was further submitted that damages would not be an adequate remedy in connection with the voting rights of the 199,998 shares of the deceased.

It was submitted on the other hand by the defendant brother first that both executors need not act jointly in registering the shares, because of a passage in *Snell's Principles of Equity* (26th Ed) at p 109. The passage is reproduced below:

4 Joint and several powers

(a) Pure personality. Where there are two or more executors, their authority over pure personalty is several as well as joint, so that one of them can dispose of pure personalty without the concurrence of the others; and this rule apparently applies also to joint administrators.

It was next submitted that registration of shares in the names of executors was valid. In this connection, it was submitted that the registration of shares without reference to the board of directors was valid because the registration was a transmission by operation of law and not a transfer and that only a transfer of shares required the production of the grant of probate in question. It was further submitted that the plaintiff brother had acquiesced in the registration of shares (with reference to the lack of consent of the board of directors and of the co-executrix) for three years and he could not be heard to say now it was void. It was also submitted by virtue of art 78 of the family company's articles, on a breach of s 131 of the Act, that there was automatic disqualification of the plaintiff brother as a director.

In reply, it was submitted for the plaintiff brother that as the action was not time-barred, acquiescence would not matter and the plaintiff brother was entitled to bring the action. Further, arts 29 and 30 required the consent of the board of directors to register the transmission of shares.

I now deal with the contention that the registration of the said 199,998 shares in the names of defendant brother and the co-executrix was invalid, and the first reason advanced for it by the defendant brother. In my view, the will of the deceased spoke expressly that the executors and trustees were to act jointly, leaving no room for ambiguity so that strictly speaking the defendant brother and the co-executrix, in obeying the testator's intention, should have applied jointly for registration of themselves as personal representatives of the estate of the deceased, instead of the defendant brother applying by himself and impliedly on behalf of the co-executrix in the matter of registration of the transmission of the shares. Learned counsel's contention that in the case of two or more personal representatives, the authority by one to dispose of pure personalty without concurrence of the other or others was joint and several was correct, but the express words of the will in question prevailed over such authority. No fraud of any kind was perpetrated in the registration of shares, the registration to and for the benefit of the estate would normally be one of the early steps in the administration of the estate, and the shares had been duly registered. The objection would therefore appear to be highly legalistic, trifling and inconsequential as far as the interests of the estate of the deceased were concerned. To allow the shares so duly registered to be 'deregistered' for the share register to be rectified would be a most undesirable retrogression, though it would advance the personal cause of the plaintiff brother in fighting to retain his post of managing director of the family company. The objection was therefore dismissed, as, in view of the circumstances stated, de minimis non curat lex.

The second reason against the registration of the shares, it was submitted to me, was that no grant of probate had been extracted when the shares in question were allowed to be registered, but this must be considered in connection with s 103(2) and (3) of the Act relied on by the plaintiff brother. I took him to mean therefore that by s 103(3) of the Act, with the fact that the grant of probate had not been extracted, it would mean that there was no 'document which is by law sufficient evidence of probate of will ...' to effect transmission of the share. Clearly the same inconsequential circumstances would have existed for the exercise of the de minimis rule but here, a statutory requirement of an Act of Parliament was additionally involved. This in turn would lead to a consideration of the well-known distinction between a mandatory requirement and a directory one. The test appears to be as was quoted in *Pow Hing & Anor* v *Registrar of Titles, Malacca*[1] in a passage in *Howard* v *Bodington*[2] per Lord Penzance as follows:

> I believe as far as the rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

Lord Hailsham in a detailed explanation of the difference, said in *London and Clydeside Estates Ltd* v *Aberdeen District Council*:[3]

> ... in the effect of a requirement being found to be a directory one, ... the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint.

Failure to comply with s 103(3) of the Act in the circumstances of this case was obviously a directory requirement, and the objection of learned counsel was therefore overruled.

The third reason against the registration of shares was that the board of directors of the family company had not approved the registration of the shares in question and counsel relied on arts 28 to 31 of the articles of association of the family company. On reading them, they would tend to support the registration of shares rather than the contended 'deregistration' of the shares. But art 26 spoke of transfer of shares having had to be with the approval of the directors. However, the transmission of shares here was by operation of law and was not a transfer at all. The distinction between a transmission and transfer of shares was too well known to be doubted.

I think it would be necessary to refer to the allegations made by the defendant brother against the plaintiff brother that the plaintiff brother had breached s 131 of the Act in failing to disclose to the board of directors his interests in contracts with the family company, etc and the detailed reply. They revealed controversies of facts which should be determined by oral evidence at the trial; such a breach, it was submitted on behalf of defendant brother, would result in the automatic disqualification of the plaintiff brother as a director, persuant to art 78, para (h) of the articles of association, and that the plaintiff brother should not be entitled to apply for injunction. The allegations at this stage would not be sufficient to preclude the issue of an injunction which was granted for reasons to be set out below.

For the detailed reasons given above, the court did not consider that the question of the invalidity of the registration of the shares in question was a serious question for trial and the reasons were rather detailed; this being out of deference to rather lengthy argument advanced to the court on it.

I think I ought to say a few words about the contention of learned counsel for the defendant brother that the 199,998 shares had been registered for three years, and the plaintiff brother had acquiesced in it, and could not be heard about it. The contention was made not in the context of delay in bringing the present proceedings but, I believe or presume to be, in the context of an estoppel in pais of common law type, vide s 115 of the Evidence Act 1950. Therefore, to answer by saying that the present action was not time-barred was not correct. Since the court did not think for reasons given that the question of the invalidity of registration of the shares in question was a serious question for trial, it would be unnecessary to deal more with the contention under reference.

The annual general meeting (hereafter 'the AGM') was looming large with all its implications in this case which could not be lost on the minds of the protagonists herein. As I had occasion to observe in *Ting Chong Maa* v *Chor Sek Choon*[4] at p 478 thus:

> There is also that kind of democracy of rule by the majority in companies except that the rights and remedies of minority shareholders are fairly and adequately set out in our Companies Act 1965. Since shareholders of the company exercise their control over the company through general meetings, they can bring about the appointment and removal of directors. Therefore the majority shareholders in effect control the directors. If the directors are supported by such majority shareholders, the minority shareholders are therefore rendered to being either spectators or victims.

If the AGM was held, before this matter was heard, it was implicit that the plaintiff brother would be removed as a director, principally because of the exercise of the voting rights as related to the said 199,998 shares. The sting for the plaintiff brother was that he was beneficially entitled to 1/4 of the 199,998 shares, and that his beneficial ownership of the said 1/4 should be used by the defendant brother against him for removing him, and nobody could be wrong in thinking that this situation would be tantamount to unjustness.

After considering all the circumstances stated herein before, for more reasons which I will set out in detail, I concluded that the exercise of the voting rights relating to the 199,998 shares of the deceased, as threatened or proposed by the defendant brother, did raise a serious question for trial, that damages would not be an adequate remedy, and the balance of convenience would lie in favour of the plaintiff brother by granting an injunction but not entirely on his own terms, but somewhat modified terms, ie (a) that such voting rights relating to 199,998 shares may be exercised if and only if both executors of the estate of the said deceased concurred expressly; (b) that in the event of both executors so concurring, then such executor or either of them should be estopped from exercising such rights as based on 1/4 of the said 199,998 shares of the deceased. I further made no order on the prayer for a further interlocutory injunction to restrain the defendant brother, his agents or servants from removing the plaintiff as managing director of the family company and further made no order also on the claim for a rectification of the register of members. I further discharged an earlier order adjourning the AGM until the disposal of the present application before me. I now give further reasons for the orders made.

First, the express provision in the will that the executors would have to act jointly had to be given effect to bearing in mind the interests of the estate of the said deceased. Both executors must concur in the exercise of the votes relating to shares of the deceased in question.

Secondly, since it would be quite outrageous for the voting rights of the 1/4 of the 199,998 share, (to such 1/4, the plaintiff brother was entitled beneficially under the

terms of the will) to be exercised against the beneficial owner of such 1/4 himself, I concluded that it would be unconscionable or inequitable for the defendant brother or for both executors to enforce his or their strict legal rights of exercising the voting rights of such 1/4 of the 199,998 shares. With such restraint imposed on the defendant brother or the executors, the struggle for power would be carried out in the just and democratic way at the AGM and it would also not be necessary anymore to prevent the AGM from being held. At the AGM, who would remain as a director, or managing director would be decided in a decisive way, making it unnecessary for the court to consider as to whether to grant or not an injunction to prevent the plaintiff brother from being removed as managing director. 'No order' for the claim for the rectification of register of members was based on the fact that the validity of the transmission of the 199,998 shares had been upheld for reasons given earlier. More reasons would have to be given to the restraint imposed on exercising the voting rights of 1/4 of the 199,998 shares, belonging beneficially to the plaintiff brother.

By stating that 'it would be unconscionable or not equitable' for any of the executors of the estate of the deceased to exercise voting rights as based on 1/4 of the 199,998 shares to which the plaintiff brother was entitled, I was not merely stating a catch-phrase, but the situation had caused me to contemplate as to the state of the principle of equitable estoppel from the cases with the limited resource of time available at my disposal. I therefore make no claim to any expertise in any way but merely seek to explain that part of my decision in this case for the consideration of all others.

In *Woodhouse AC Israel Cocoa Ltd* v *Nigerian Produce Marketing Co Ltd*[5] at p 758, Lord Hailsham referred to the need to reduce the principles of equitable estoppel into 'a coherent body of doctrine', bemoaning, apparently, the lack of it.

Equitable estoppel has been the instrument through which courts have intervened for centuries to prevent fraud, unconscionable conduct and transactions; as a principle it is closest to the notion of justice as perceived by the man in the street.

Professor Hanbury in *Hanbury's Modern Equity* (9th Ed) defines it as 'a doctrine which prevents (estops) a person acting inconsistently with a representation which he has made to the other party in reliance of which the other party has acted to his detriment'. With the greatest respect, the definition is certainly correct, but there are many cases which may now lie outside it.

At the outset, it is to be borne early in mind the distinction between common law estoppel and equitable estoppel; the former is a mere rule of evidence and is subject to technicalities and rules, such as those seemingly laid down in s 115 of the Evidence Act 1950, while the latter does give rise to substantial rights and remedies. Thus, in the case of common law estoppel, eg a man on a certain day makes a statutory declaration saying that certain specified goods belong to a third party, will be estopped from saying in evidence that the same goods have all belonged to himself in fact, and in the case of equitable estoppel, a tenant obtained a 30-year lease of land against his landlord who sought to evict him on the basis of a one month's notice to quit when the doctrine of equitable estoppel was applied in our well-known case of *Siew Soon Wah* v *Yong Tong Hong*.[6]

At some risk of over simplification, the well-known passage in *Ramsden* v *Dyson*[7] put the doctrine of equitable estoppel firmly on a pedestal. The passage, per Lord Kingsdown, was as follows:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, *under an expectation, created or encouraged by the landlord* (my italics) that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.

The passage was followed in a great number of cases, including the Privy Council case of *Plimmer* v *Mayor, Councillors and Citizens of Wellington*.[8] These cases were cases where expectations were created, that were falsified, or representations were made that were not made good. Lord Denning has contributed a great deal towards the doctrine by the many cases he decided, in which his Lordship has repeatedly invoked it, notably such as *Inwards* v *Baker*[9] and *ER Ives Investment Ltd* v *High*.[10] Lord Denning seems to have pioneered the nature of the relief to be granted to satisfy the equity, ie that it is for the court to decide in each case how the equity that has arisen is to be satisfied. His Lordship seems to have firmly fixed the label of 'equity' on such transactions involving equitable estoppel.

In my opinion, it should be stressed that the principle of equitable estoppel need not be confined to cases involving land or an interest in land. Thus in *Amalgamated Investment & Property Co Ltd* v *Texas Commercial International Bank*,[11] it was extended to a case of a letter of guarantee given to the defendant bank there.

About 80 years before *Inwards* v *Baker*,[9] Fry J in *Willmott* v *Barber*,[12] speaking of acquiescence giving rise to equitable estoppel, laid down very elaborately four requisites for acquiescence to deprive the man of his legal rights:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted

> in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) of the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

In my opinion, Lord Kingsdown's passage and the passage of Fry J viewed presently, do not go as far as what really is the present state of the law of equitable estoppel. They still apply but they seem to overstate the requirements for equitable estoppel to apply. The law, I believe, is what Lord Scarman LJ said in *Crabb* v *Arun District Council*,[13] at p 192. His Lordship said:

> If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the court, having analyzed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?

Lord Denning in the same case, put it in another way at p 188, when his Lordship said:

> The question then is, were the circumstances here such as to raise an equity in favour of the plaintiff?

It will be seen the doctrine operates in a much broader way so as to include cases which do not only involve strictly, expectations or acquiescence, the essence now being of conduct and relationship of the parties.

Oliver J (now Lord Oliver of Aylmerton) in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees*,[14] obviously disapproving the rather rigid five requisites of Fry J in *Willmott*,[12] said:

> ... the broad test of whether in the circumstances the conduct complained of is unconscionable without the necessity of forcing those incumbrances into a Procrustean bed constructed from some unalterable criteria.

Buckley LJ in much the same vein and more forcefully, in *Shaw* v *Applegate*,[15] when commenting on the five requisites laid down by Fry J, had this to say:

> The real test, I think, must be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.

Coming back to the instant case, after considering the conduct especially of the defendant brother in his undoubted threat to exercise the voting rights even of 1/4 of the 199,998 shares to which the plaintiff brother was beneficially entitled and considering the relationship of the parties and the circumstances, it would be unconscionable for the defendant brother as the executor to enforce his strict legal right to exercise such voting rights. I therefore also made the order as stated above by disallowing the exercise of the voting rights of 1/4 of the 199,998 shares to which the plaintiff brother was beneficially entitled, as the manner also satisfying the equity which has arisen in favour of the plaintiff brother.

The present state of the doctrine of equitable estoppel as perceived and stated above may be highly vulnerable to the criticism of creating uncertainty and a good many people may find it 'an unruly horse' of the worst type; they can however take comfort in the great fund of self-restraint of judges in deploying it to prevent a person from enforcing his strict legal rights where it would be unconscionable and therefore inequitable to do so.

Order accordingly.

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Reported by *PS Ranjan*